STATE OF MICHIGAN

COURT OF APPEALS

PAWITER PARHAR,

Plaintiff-Appellee,

v

DART CONTAINER CORPORATION,

Defendant-Appellant.

UNPUBLISHED
March 16, 2006

No. 258471
Ingham Circuit Court
LC No. 03-001546-NO

Before: Smolenski, P.J., Whitbeck, C.J., and O'Connell, J.

PER CURIAM.

Defendant Dart Container Corporation appeals by leave granted an order denying defendant's motion for summary disposition under MCR 2.116(C)(10). Plaintiff Pawiter Parhar alleges that defendant discharged him in violation of Michigan's Elliot-Larsen Civil Rights Act ("ELCRA")[1] specifically claiming that defendant discharged him because of his national origin. In part, the trial court found that plaintiff had made a prima facie showing of discrimination based on his national origin. We disagree and reverse and remand for entry of an order granting defendant's motion for summary disposition.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). When deciding such a motion, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Id.* A mere promise to offer facts at trial that will support a claim is insufficient. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). Consequently, summary disposition should be granted under MCR 2.116(C)(10) if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Roberson*, 212 Mich App 45, 48; 536 NW2d 834 (1995). A genuine issue of material fact exists when, giving the benefit of reasonable doubt to the opposing party, the record leaves open an issue upon which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

[1] See MCL 37.2101 *et seq.*

Again, plaintiff claims that defendant discharged him because of his national origin in violation of ELCRA. MCL 37.2202(1)(a) provides, in relevant part, that an employer cannot discriminate against an individual because of the individual's national origin. A plaintiff may establish proof of discriminatory treatment in violation of the ELCRA either by direct evidence or by indirect or circumstantial evidence. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 132; 666 NW2d 186 (2003). Direct evidence is evidence, "which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Id.* at 133 (internal quotations omitted). In direct evidence cases, the plaintiff must show that (1) he is a member of a protected class; (2) he was discharged; (3) the discharging employer was predisposed to discriminate against persons in the protected class; and (4) the employer had actually acted on that disposition in discharging him. *Singal v Gen Motors Corp*, 179 Mich App 497, 503; 447 NW2d 152 (1989). We conclude that there was no direct evidence submitted, and plaintiff does not argue that this test was proper under the facts alleged.

In an action alleging employment discrimination based on indirect evidence of discrimination, the plaintiff must present a rebuttable prima facie case through proofs that would allow a factfinder to infer that the plaintiff was the victim of unlawful discrimination. *Sniecinski*, *supra* at 134. In Michigan, our courts have adopted the burden-shifting approach set forth by the United States Supreme Court in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Sniecinski*, *supra* at 133-134. Under *McDonnell Douglas*, a plaintiff can make a prima facie showing of discrimination by showing that (1) the plaintiff was a member of a protected class; (2) the plaintiff suffered an adverse employment action; (3) the plaintiff was qualified for the employment position; and (4) the action taken by the defendant gives rise to an inference of unlawful discrimination. *Hazle v Ford Motor Co*, 464 Mich 456, 463; 628 NW2d 515 (2001). A plaintiff has made a showing on the fourth element, for example, when the plaintiff has presented proof that either the job was given to someone under circumstances that create an inference of unlawful discrimination or that the defendant treated the plaintiff differently than persons of a different class for the same or similar conduct. *Id.* at 468; *Meagher v Wayne State Univ*, 222 Mich App 700, 716; 565 NW2d 401 (1997).

The crux of the first issue on appeal is whether plaintiff made a prima facie showing of the fourth element. Plaintiff misconstrues the requirements of this element contending that because plaintiff was essentially replaced by a Caucasian, he has made a prima facie showing. To the contrary, our Supreme Court has cautioned against the use of the argument that "a prima facie case of unlawful discrimination can be established merely by providing evidence that a qualified minority candidate was rejected in favor of a qualified nonminority candidate." *Hazle*, *supra* at 471, n 14. In *Hazle*, the plaintiff presented evidence that she was more qualified for the position for which she applied than the nonminority who obtained the position. Hence, there was evidence from which a jury could infer unlawful discrimination. *Id.* at 471-472. While *Hazle* involved a candidate who was overlooked for promotion, the Court's cautionary statement is equally applicable to the facts of this case. Here, after discharging plaintiff, defendant reassigned a nonminority to assume plaintiff's duties and eventually hired a nonminority to replace him. However, these facts by themselves do not suggest an unlawful purpose. *Id.* at 471 n 14.

Plaintiff argues that an unlawful purpose was shown by evidence, which suggests that he was treated differently by defendant based on his national origin. We disagree. To show

disparate treatment, a plaintiff must show that he and a coworker "were similarly situated, i.e., 'all of the relevant aspects' of [the plaintiff's] employment situation were 'nearly identical' to those of [a coworker's] employment situation." *Town v Michigan Bell Telephone Co*, 455 Mich 688, 699-700; 568 NW2d 64 (1997) (citations omitted). In support of plaintiff's argument that he was treated differently, he testified that, while working, he informed his manager that he had overheard a coworker talking about him. According to plaintiff, his manager did not further investigate plaintiff's complaint. However, there is no evidence to suggest that a nonminority employee that was similarly situated to plaintiff was treated differently by defendant.

Plaintiff also notes that his supervisor testified that she had on a previous occasion presented a written warning to an employee for either absenteeism or tardiness. Plaintiff contends that his supervisor's failure to talk to plaintiff about a few of the problems he had at work or present him with a formal warning is evidence of disparate treatment. However, plaintiff was not similarly situated with the employee that was disciplined in writing, because plaintiff did not engage in the same conduct for which the other employee was disciplined. See *Town*, *supra* at 699-700. After a review of the record in a light most favorable to plaintiff, we conclude that he failed to present evidence to suggest that defendant treated him differently than persons of a different class for the same or similar conduct. In sum, plaintiff failed to make a prima facie showing because the circumstances surrounding and leading up to his discharge did not create an inference of unlawful discrimination. Therefore, the trial court improperly denied defendant's motion for summary disposition.

In light of this analysis, we need not reach defendant's argument that plaintiff failed to raise a triable issue regarding whether defendant's proffered reason for discharge was a pretext for unlawful discrimination.

Reversed and remanded for entry of an order granting defendant's motion for summary disposition. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ William C. Whitbeck
/s/ Peter D. O'Connell